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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1965

NO. 485

WALTER OTTO,

PETITIONER

VS.

MAYOR, COUNCIL OF COMMISSIONER, ET AL

RESPONDENTS

* *

PETITION FOR WRIT OF CERTIORARI

* *

WALTER OTTO

123 REBECCA STREET

DAYTON, OHIO 45407

PETITIONER IN PERSON

JAMES W. DRAKE

W. ERWIN KILPATRICK

2nd FLOOR, MUNICIPAL BUILDING

DAYTON, OHIO 45402

ATTORNEYS FOR RESPONDENTS

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TABLE OF CONTENTS

	Page
REFERENCE TO REPORTS OF OPINIONS BELOW	1
GROUNDS OF JURISDICTION OF THIS COURT	1
QUESTIONS PRESENTED FOR REVIEW	2
CONSTITUTIONAL PROVISIONS AND LAWS	3
Const. Art. 3, Sec. 2	3
Const. Amend. 5	3
Const. Amend. 14, Sec. 1	3
28 USC 1254	3
28 USC 1291	3
28 USC 1331	4
28 USC 1343	4
42 USC 1983	5
42 USC 1985	5
42 USC 1988	5
STATEMENT OF THE CASE	6
ARGUMENT	8
JUDGMENT OR DECREE IN QUESTION	11
PROOF OF SERVICE	12
CASES CITED	
Bell v Hood, 327 US 678	8
Crampton v Zabriskie, 101 US 601	9
Doremus v Board of Education, 342 US 429	9
Everson v Board of Education, 330 US 1;	9
Gully v First National Bank, 299 US 109	10
Levering & Garrigues Co. v Morrin, 289 US 103	8
Massachusetts v Mellon, 262 US 447	9
Mosher v Phoenix, 287 US 28	8
Otto v Somers, 332 F. 2d 697	11
The Fair v Kohler Die and Specialty Co., 228 US 22	8
Truax v Corrigan, 257 US 312	9

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REFERENCE TO REPORTS OF OPINIONS BELOW

No opinions were delivered or reported in this case in the courts below.

GROUNDS OF JURISDICTION OF THIS COURT

Jurisdiction of this court is invoked on grounds that the court of appeals has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court.

The judgement or decree sought to be reviewed was made and entered on June 23, 1966 in Case No. 17,210 upon the docket of the United States Court of Appeals for the Sixth Circuit.

There is no order respecting a rehearing in this case, nor other order granting an extension of time within which to petition for certiorari.

The statutory provision believed to confer on this court jurisdiction to review the judgment or decree in question by writ of certiorari is Title 28, United States Code, Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Are municipal ordinances or regulations which operate to make lawful extra appropriations or extra disbursements to certain persons or classes, involving the use of illegal means or illegal coercion of resident taxpayers and thereby depriving resident taxpayers of taxable income money and pocketbook property, invalid under Const. Amend. 5, Const. Amend. 14, Sec. 1?

2. Will the Constitution and laws of the United States prevent, or permit redress in federal courts for, concert of action under color of State law, which consists of preparing, making, administering and enforcing the operation of municipal ordinances or regulations naming certain persons or classes for extra compensations, extra payments and extra contributions, on the one hand, and imposing the burden of resulting obligations upon another person or class?

3. Does a United States Court of Appeals want of jurisdiction of a cause before the court on a motion of defendants-appellees to dismiss a timely appeal from the final decision of the United States District Court, for want of jurisdiction over the subject matter, after the allegations made by the plaintiff-appellant in the complaint invoke the original jurisdiction of the district court in the first instance, based on claims of a cause of action and a right to recover secured under the Constitution and laws of the United States?

CONSTITUTIONAL PROVISIONS AND LAWS INVOLVED

Constitution of the United States, Article 3, Section 2:

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;

Constitution of the United States, Amendment 5:

No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States, Amendment 14, Section 1:

... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28, United States Code, Section 1254;

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Title 28, United States Code, Section 1291:

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, ...

Title 28, United States Code, Section 1331:

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

Title 28, United States Code, Section 1343:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordnance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Title 42, United States Code, Section 1983:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Title 42, United States Code, Section 1985:

(3) Depriving persons of rights or privileges

If two or more persons of any State or Territory conspire ... for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; ... in any case of conspiracy set forth in this section, if one or more persons engaged therein do or cause to be done, any act in furtherance of the object of the conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Title 42, United States Code, Section 1988:

The jurisdiction in civil and criminal matters conferred on district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all

cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

STATEMENT OF THE CASE

Notice of appeal to the United States Court of Appeals for the Sixth Circuit was filed on March 19, 1966 from the final decision made and entered on February 17, 1966 in Civil Action File No. 3245 upon the docket of the court of first instance, the United States District Court for the Southern District of Ohio, Western Division.

On June 23, 1966, the cause came before the court of appeals on a motion by defendants-appellees filed to dismiss the appeal of plaintiff-appellant on the ground that the court lacks jurisdiction of the subject matter.

Upon consideration of the motion to dismiss, the complaint, and the record on appeal, the court of appeals then ordered that the appeal of plaintiff-appellant be dismissed for want of jurisdiction.

As determined by the allegations made by the plaintiff in the complaint, there shows measurable appropriations or disbursements occasioned solely by concerted action of defendants, on or about February 3, 1966, February 17, 1966 and March 10, 1966, of which plaintiff complains, as

did result to subject plaintiff and all other similarly situated members of plaintiff's class to deprivation of acquired, possessed and enjoyed personal civil rights of liberty and several direct and immediate civil interests in income money and pocketbook property involved in the action, in the sum or value of $108,810.93, exclusive of interest and costs.

Plaintiff's allegations show that the object of said concerted acts of defendants, pursuant to their purpose, was to favor and privilege certain persons or classes named by defendants for certain extra appropriations or extra disbursements in the sum or value of $108, 810, 93, and to impose the full resulting burdens of obligations upon plaintiff and all other similarly situated members of, plaintiff's class.

As set forth in the complaint, there shows that the means used by defendants to attain the object of their action was to act in concert in employment of power they did then possess under color of certain provisions of the Constitution and statutes of the State of Ohio, and to then prepare, make, administer and enforce the operation of certain ordinances or regulations naming said certain persons or classes for extra compensations, extra payments and extra contributions, on the one hand, and imposing said full resulting burdens of obligations upon plaintiff and all other similarly situated members of plaintiff's class on the other hand, under the intended and actual operation of said ordinances or regulations.

The allegations made by the plaintiff in the complaint invoke the original jurisdiction of the district in the first instance, based on claims of a cause of action and a right to recover secured under the Constitution and laws of the United States, Article 3, Section 2, Amendment 5,

and Amendment 14, Section 1; and Title 28, United States Code, Sections 1331 and 1343; and Title 42, United States Code, Sections 1983, 1985 and 1988.

ARGUMENT

Pertinent to the questions presented for review, this court has previously decided as follows, to which the judgment or decree sought to be reviewed appears in conflict:

The question of jurisdiction of cases involving federal questions is determined by the allegations made by the plaintiff. Levering & Garrigues Co. v Morrin, 289 US 103, 105, citing Mosher v Phoenix, 287 US 28, 30.

Before deciding that there is no jurisdiction the district court must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States. For to that extent 'the party who brings the suit is master to decide what law he will rely upon, and does determine whether he will bring a suit arising thereunder.' Bell v Hood, 327 US 678, 681, citing The Fair v Kohler Die and Specialty Co., 228 US 22, 25.

And it is established practice for this Court to sustain the jurisdciction of federal courts to issue injunctions to protect rights safeguarded by the Constitution and to restrain individual state officers from doing what the 14th Amendment forbids the States to do. Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done. Bell v Hood, 327 US 678, 684.

(The due process clause) tends to secure equality of law in the sense that it makes a required minimum of protection for everyone's right of life, liberty and property, which the Congress or the legislature may not withhold. ... The guaranty (of equal protection) was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. Truax v Corrigan, 257 US 312, 332-333.

Of the right of resident taxpayers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of a county or the illegal creation of a debt which they in common with other property holders of the county may otherwise be compelled to pay, there is at this day no serious question. Crampton v Zabriskie, 101 US 601, 609.

'The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate ... ' and such causes have been entertained in federal courts. Doremus v Board of Education, 342 US 429, 433, 434, citing Crampton v Zabriskie, 101 US 601, 609 and Commonwealth of Massachusetts v Mellon, 262 US 447, 486.

It is true that this Court found a justiciable controversy in Everson v Board of Education, 330 US 1. But Everson showed a measurable appropriation or disbursement of school-district funds occasioned solely by the activities complained of. Doremus v Board of Education 342 US 429, 434.

Concert of action is a conspiracy, if the object is unlawful, or if the means used are unlawful. Truax v Corrigan, 257 US 312.

Municipal ordinances or regulations which operate to make lawful extra appropriations or extra disbursements to certain persons or classes, in-

volving the use of illegal means or illegal coercion of resident taxpayers and thereby depriving resident taxpayers of taxable income money and pocketbook property, deprives the resident taxpayers of their property without due process of law, without just compensation, without the equal protection of the laws and withoutequal privileges and immunities under the laws, and are invalid under Const. Amend. 5, Const. Amend. 14, Sec. 1.

Concert of action under color of State law, which consists of preparing, making, administering and enforcing the operation of municipal ordinances or regulations naming certain persons or classes for extra compensations, extra payments and extra contributions, on the one hand, and imposing the burden of resulting obligations upon another person or class, is beyond question illegal means or illegal coercion to effectuate the object of the concerted action, which the Constitution and laws of the United States will prevent or redress. Const. Art. 3, Sec. 2, Amend. 5, Amend. 14, Sec. 1; 28 USC 1331, 1343; 42 USC 1983, 1985, 1988.

Petitioner respectfully submits to the Court that federal jurisdiction exists over the subject matter of this action, and that the United States Court of Appeals does not want of jurisdiction of the appeal, pursuant to the foregoing and/or pursuant to the rules for determining when a case involving federal questions ~~arises~~ under the Constitution of the United States, as restated by the Court in Gully v First National Bank, 299 US 109, 112-113. First, there must be a right or immunity created by the Constitution, laws, or treaties of the United States which must such that it will be supported if the Constitution, laws, or treaties of the United States are given one construction, or defeated if given another. Second, a genuine and present controversy as distin-

guished from a possible or conjectural one must exist with reference to the federal right. Third, the controversy must be disclosed upon the face of the complaint unaided by the answer.

WHEREFORE, this petitioner, Walter Otto in person, respectfully asks this Honorable Court for an order granting writ of certiorari to review the judgment or decree in question.

Respectfully submitted,

_____

Walter Otto, petitioner

JUDGMENT OR DECREE IN QUESTION

This cause is before the court on a motion by defendants-appellees to dismiss the appeal of plaintiff-appellant for want of jurisdiction.

Plaintiff-appellant is a resident of Ohio and alleges a federal cause of action exists to prevent expenditures of the municipal corporation of Dayton, Ohio.

Upon consideration of the motion to dismiss, the complaint, and the record on appeal in this case,

IT IS HEREBY ORDERED that the appeal of plaintiff-appellant be dismissed for want of jurisdiction. Otto v. Somers, 332 F. 2d 697 (C.A. 6, 1964).

PROOF OF SERVICE

This petitioner, Walter Otto in person, hereby certifies that a copy of the foregoing petition for writ of certiorari was served on respondents by depositing a copy addressed to their attorneys, first class postage prepaid, in the United States Post Office, this _____ day of _____, 1966.

_____

Walter Otto, petitioner

123 Rebecca Street

Dayton, Ohio 45407

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Respondents.

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BRIEF IN OPPOSITION TO GRANTING A WRIT OF CERTIORARI

: :

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STATEMENT OF FACTS

Petitioner herein filed his complaint herein on December 10, 1965, in the District Court for the Southern District of Ohio, complaining therein about the Dayton City Commission and certain municipal officers authorizing the payment of legal fees to Squire, Sanders & Dempsey, by Ordinance No. 21527 (1-b), authorizing the payment of a judgment against police officers and court costs by Ordinance No. 21547 (7-b), and

authorizing by Ordinance No. 21568 (9-b) a contribution toward building an over-pass over a railroad on a road leading to a municipal water treatment plant and golf course.

The district court dismissed petitioner's complaint therein on the ground that it did not have jurisdiction over the subject matter and that the complaint failed to state a claim upon which relief could be granted pursuant to defendants' motion on February 17, 1966.

Petitioner then appealed the dismissal by the district court to the United States Court of Appeals for the Sixth Circuit. After petitioner filed his brief, defendants moved the Court to dismiss the appeal on the ground that the Court did not have jurisdiction of the appeal and the appeal was frivolous. The motion was sustained by order dated June 23, 1966, and the appeal dismissed for want of jurisdiction.

Petitioner then made this petition for a Writ of Certiorari.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. There are no special or important reasons for granting the Writ.

2. No important question of Federal law that is unsettled or in conflict with the decisions of this Court has been presented to or decided by the Court of Appeals.

3. No Federal Court jurisdiction exists.

ARGUMENT

1. NO SPECIAL OR IMPORTANT REASONS FOR GRANTING THE WRIT.

This is the third time that petitioner has petitioned this Court for a Writ of Certiorari since 1962. Twice he petitioned therefor in a suit involving the same species of claims but a different set of facts, which however, were very comparable as to the applicable law. Petitioner's theory seems to be the same as before. See No. 845 Misc., Walter Otto v. Honorable Frank R. Somers, Mayor, etc., et al., 372 U.S. 948, Petition for Rehearing denied, 372 U.S. 972 and No. 378 Misc., Walter Otto v. Honorable Frank R. Somers, etc., et al., 379 U.S. 1002, rehearing denied, 380 U.S. 938.

Petitioner could have had a remedy in the Ohio courts pursuant to Section 733.57, et seq., Ohio Revised Code (11-b), and Section 59, et seq. (12-b) of the Charter of the City of Dayton, Ohio, if the expenditure of the funds authorized by the ordinances complained of were found to be in contravention of law.

Since petitioner did have a forum in which to assert his claim, namely, the Ohio courts, and he had been twice told by the Federal Courts that they could not entertain his former claim, counsel for defendants submits to the Court that there is

no special nor important reason why the Writ should be granted here.

2. NO IMPORTANT QUESTION OF FEDERAL LAW THAT IS UNSETTLED OR IN CONFLICT WITH THE DECISIONS OF THE COURT HAS BEEN PRESENTED TO OR DECIDED BY THE COURT OF APPEALS.

The District Court dismissed petitioner's complaint for want of jurisdiction of the subject matter and because it did not state a claim for relief. The Court of Appeals dismissed the appeal for want of jurisdiction. Petitioner has not shown where any important Federal question is involved is unsettled or in conflict with the decisions of this Court.

Petitioner alleges he is a member of a class of taxpayers and that the City Commission has authorized the expenditure of funds illegally. This is followed by a multitude of legal conclusions that he has been deprived of property without due process, rights and liberties, without just compensation, equal protection of the law, etc. He sets forth no facts to show how any of this happened. He apparently thinks that if a large number of statutes are recited in the allegation of jurisdiction in his complaint and appropriate legal conclusions follow, the Court has jurisdiction and he has stated a claim for relief even though no facts are alleged and no question within the purview of the Federal Courts is raised, let alone a substantial one.

The cases cited in petitioner's petition with regard to taxpayers suits are readily distinguishable. Doremus v. Board of Education, 342 U.S. 429, and Everson v. Board of Education, 330 U.S. 1, while they were brought by taxpayers, raised a substantial Federal question under the First Amendment. Crampton v. Zabriskie, 101 U.S. 601 was based on diversity jurisdiction and the jurisdictional question was not discussed. Massachusetts v. Mellon, 262 U.S. 447, dealt with a Federal grant and standing to sue.

3. NO FEDERAL COURT JURISDICTION EXISTS.

Counsel respectfully submits that the courts below correctly decided the case; they had no jurisdiction over the subject matter of the action.

> "It appears that appellant has misconceived the nature of his remedy as a taxpayer, if he has such a remedy. What appellant claims is that the municipal authorities have wrongfully expended or misapplied funds of the municipality. If such funds have been so wrongfully expended or misapplied -- a species of conduct of which we are entirely without knowledge -- then a cause of action may exist in favor of the municipal corporation. In such a case, if the municipality or the municipal authorities refuse to act